

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

74-2374

Case No. 74-2374

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PIETRO C. RUBINO, for himself and
all other persons similarly
situated, et al.,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

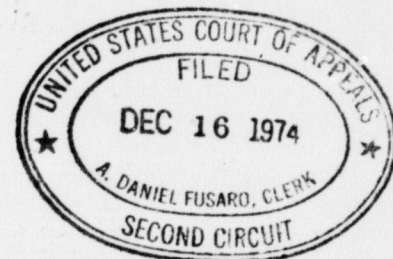
Plaintiff-Intervenor-
Appellant,

-against-

JOHN J. GHEZZI, et al.,

Defendants-Appellees.

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BRIEF FOR AMICUS CURIAE
AMERICAN ASSOCIATION OF RETIRED PERSONS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MILLER, SINGER, MICHAELSON & RAIVES
Attorneys for Amicus Curiae
555 Madison Avenue
New York, New York 10022
752-8830

Alfred Miller
Stephen L. Solomon
Of Counsel

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF POSITION	2-3
III. MANDATORY RETIREMENT STATUTES, PROVISIONS, PRACTICES AND POLICIES ARE UNCONSTITUTIONAL	3
IV. STUDIES SHOW THAT AGE IS NOT AN ACCURATE OR APPROPRIATE CRITERION FOR DISTINGUISHING WORKERS' ABILITIES	4-6
V. CONCLUSION	7

I.

INTRODUCTION

The American Association of Retired Persons, 1909 K Street, N.W., Washington, D.C. 20006 ("AARP"), an organization whose members comprise close to 7,000,000 persons over the age of 55, submits this amicus curiae brief because it regards the issue raised by the instant action, whether mandatory retirement statutes may be used to force a person elected to a public office to leave his office before the expiration of his term, to be of monumental importance not only to the class of persons elected to public office but also to all persons who may be denied their constitutional right to work as a result of mandatory retirement provisions.

We have no desire to burden the court with repetition of arguments otherwise well made and urge the court to consider fully the arguments made in the appellant's brief regarding the unconstitutionality of the New York State constitutional provision, N.Y.State Const. Art. 6, §25(b), and statute, N.Y. Judiciary Law §23, which mandate the retirement of elected judges prior to the expiration of their elected term of office, in which we join. Our purpose herein is simply to bring to the attention of the court information which demonstrates that age is neither an accurate nor appropriate criterion for distinguishing the abilities of workers.

II.

STATEMENT OF POSITION

The AARP has consistently taken a stand against all mandatory retirement practices and policies and at its 1974 biennial convention it adopted resolutions condemning such practices and policies. The National Retired Teachers Association, AARP's sister organization of approximately 450,000 retired teachers and administrators, has also consistently condemned all mandatory retirement practices and policies and, at its 1974 biennial convention, it, too, adopted resolutions to that effect.

The resolutions adopted provide in part that age-motivated retirement practices in business, industry and government are wrong because they deprive our nation of the wisdom, experience and productivity of some of its most capable citizens and because they deprive affected individuals of a right that should be limited only by his or her ability, desire and need, not by age.

Today, more than ever, the need to eliminate all mandatory retirement practices is crucial. There is an ever-widening gap between retirement and employment income,

heightened by rampant inflation, and prospects for any substantial improvement in the income status of retirees seem dim at this time. Statistics show that there has been an increase in both the number and proportion of aged poor Americans in recent years. Older Americans are twice as likely to be poor as younger persons. Approximately one out of every four individuals 65 and older -- in contrast to one in nine for younger persons -- lives in poverty today.¹

III.

MANDATORY RETIREMENT STATUTES, PROVISIONS, PRACTICES AND POLICIES ARE UNCONSTITUTIONAL

The AARP believes that all mandatory retirement statutes, provisions, practices and policies are unconstitutional, and has worked towards eliminating such barriers to employment of older persons through efforts to effect legislation prohibiting such practices.

The AARP wholeheartedly subscribes to the arguments made in the appellant's brief.

1. Special Committee on Aging, United States Senate "Economics of Aging: Toward a Full Share in Abundance" (1970), at 8.

IV.

STUDIES SHOW THAT AGE IS NOT AN ACCURATE OR APPROPRIATE CRITERION FOR DISTINGUISHING WORKERS' ABILITIES

Scientific studies demonstrate that age is not a suitable criterion for distinguishing workers' abilities.² Studies of older employees indicate that their performance is rated as good as or superior to younger workers in almost all respects;³ that there is no set pattern of decline in intellectual productivity and indeed that many persons have increased productivity in their seventies, eighties and nineties.⁴

A report of investigations by the U.S. Bureau of Labor Statistics indicates that in the case of office workers, the oldest age group -- 65 and over -- actually had the highest performance record.⁵ As the U.S. Senate Special Committee on Aging reported this past year:

[T]here is no question that many persons over age 65 are still quite capable of working. A recent

2. See generally, "Age Discrimination in Employment: The 'Problem' of the Older Worker", 41 N.Y.U.L. Rev. 383, 396-8 (1966); Note, "Too Old to Work, The Constitutionality of Mandatory Retirement Plans", 44 So. Cal. L. Rev. 150, 159-61 (1971)

3. "Peterson, Older Workers and Their Job Effectiveness", in Gerontology (C.B. Vedder ed. 1963).

4. See, e.g., "Age, Intelligence and Learning" by Russell F. Green in Industrial Gerontology, No. 12 Winter 1972, pp. 29-40; Nevil Tronchin-James, Arbitrary Retirement (1962), particularly chapters 7 and 8; Baltes and Schaie, "The Myth of the Twilight Years", Psychology Today 35 (March 1974); Sheppard, Towards an Industrial Gerontology (1970).

5. "Comparative Job Performance of Office Workers by Age", Monthly Labor Review, January 1960, at 39.

study of 132,316 workers in New York State agencies found that workers over 65 are "about equal to" and sometimes "noticeably better" than younger workers in job performance. They are at least as punctual in reporting to work, have fewer on-the-job accidents and are less often absent from work because of illness, accidents or unexplained reasons.⁶

Evidence shows that there are no significant age differences in perceptual accuracy or in measure of intellectual attainment⁷ and that even in a profession as demanding as that of airplane pilots, age per se is not necessarily equated with decline in ability to perform.⁸ As a matter of scientific fact, elderly workers are not only able to produce a volume of work equal to that produced by younger employees, but in some circumstances even out-produce their younger counterparts.⁹ Older workers have a lower rate of absenteeism; cause fewer job-related accidents, and are less likely to seek other employment.¹⁰

6. Special Committee on Aging, United States Senate, "Improving the Age Discrimination Law", a Working Paper (1973), at 15.

7. Christensen, "Interference in Memory as a Function of Age", XXIX Dissertation Abstracts 2216-B (1968).

8. Szafran, "Psychological Studies of Aging in Pilots", 40 Aerospace Medicine 543 (1969).

9. See "Age Discrimination in Employment", Hearings of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., 370-71 (1969).

10. Id. at 391, 369, 370. See also note 6 supra.

Dr. James Birren, Director of the Gerontology Center at the University of Southern California, has stated the following regarding the change in intellectual capacities in later life:

Because of my research background I have been involved in several policy discussions during my career about the use of chronological age as an index for retirement. This has involved a role as a consultant to the Federal Aviation Agency with regard to commercial airline pilots, the United States Army, and other groups. My own research has borne out the fact that given good health, there is little change in intellectual capacities in later life, i.e., decrements in ability occur when the individual has suffered a change in health, but not because of intrinsic processes that could be identified with chronological age or aging.¹¹

The conclusion which must be reached by the court from these investigations is that age is not a suitable criterion for distinguishing the abilities of judges to perform the full duties of their office and that, in fact, it should be an irrelevant factor for employment considerations.

11. Birren, Increments and Decrements in the Intellectual Status of the Aged, Psychiatric Research Report 23, at 207, 213 (1968).

V.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges the court to reverse the Order denying a three-judge court and dismissing the action and to remand the matter for the convention of a three-judge court.

Respectfully submitted,

Miller Singer Michaelson & Raives
MILLER, SINGER, MICHAELSON & RAIVES
Attorneys for Amicus Curiae

Alfred Miller
Stephen L. Solomon
Of Counsel

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SUSAN MEYERS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1440 East 14th Street, Brooklyn, New York. That on the 13th day of December, 1974 deponent served the within Brief Amicus Curiae on behalf of the American Association of Retired Persons upon:

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the State of New York
2 World Trade Center
New York, New York 10047
Attention of Seth Greenwald, Esq.

STEPHEN GILLERS, Esq.
250 Broadway
New York, New York 10007

ADRIAN BURKE, Esq.
Corporation Counsel
Municipal Building
New York, New York 10007
Attention of William DeWitt, Esq.

SAM GOTTLIEB, Esq.
Gainsburg, Gottlieb, Levitan & Cole
122 East 42nd Street
New York, New York 10017

the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care of the United States Post Office within New York State.

Sworn to before me this
13th day of December, 1974

Susan Meyers

Stephen L Solomon

STEPHEN L. SOLOMON
Notary Public, State of New York
No. 31-3766075 Qual. in New York County
Commission Expires March 30, 1971

